

SCHIFF HARDIN LLP
Jean L. Bertrand (Bar No.083250)
jbertrand@schiffhardin.com
Jeffrey V. Commisso (Bar No. 191267)
jcommisso@schiffhardin.com
One Market, Spear Street Tower
Thirty-Second Floor
San Francisco, CA 94105
Telephone: (415) 901-8700
Facsimile: (415) 901-8701

Attorneys for Plaintiff
G.G. Marck & Associates, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

G.G. Marck & Associates, Inc.,

Plaintiff,

v.

James Peng, Photo U.S.A.
Corporation, North American
Investments Corp., and Photo USA
Electronic Graphic, Inc.,

Defendants.

Case No. C 07 80222 MISC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
G.G. MARCK'S MOTION TO
COMPEL DEFENDANTS'
DEPOSITIONS (DEBTOR
EXAMINATIONS) AND
PRODUCTION OF DOCUMENTS**

DATE: April 25, 2008
TIME: 9:00 a.m.
JUDGE: Hon. Jeffrey White

1 **I. INTRODUCTION**

2 G. G. Marck & Associates seeks an order compelling judgment debtors
3 James Peng, Photo U.S.A. Corporation, and North American Investments
4 Corporation to appear for depositions. G.G. Marck has a \$1.5 million judgment
5 against Peng and his companies, Photo U.S.A. Corporation, North American
6 Investments Corporation, which was entered by the United States District Court for
7 the Northern District of Ohio.

8 Last winter, G. G. Marck properly registered its judgment here and served
9 deposition notices on Peng and his companies (collectively "Peng") as part of an
10 effort to locate and identify Peng's assets for collection.

11 Peng first asked to postpone these depositions, which G. G. Marck agreed to
12 do. Then, at the eleventh hour, Peng claimed he was out of the county, too ill to
13 travel, and that none of the depositions could proceed. G. G. Marck was skeptical
14 of this, but instead of proceeding immediately with motion practice came to an
15 agreement with Peng's counsel: Peng agreed (in principle) to a stipulated order
16 providing that (i) Peng would appear for deposition on or before a date certain; and
17 (ii) Peng would produce documents at least five days before his deposition.

18 G. G. Marck prepared a proposed stipulation and order based on the parties'
19 agreement, but Peng's counsel has not responded to that proposed order, to G.G.
20 Marck's phone calls, or to letters. Consequently, G. G. Marck had no option but to
21 seek the Court's assistance.

22
23 **II. ATTEMPTS TO AVOID MOTION PRACTICE**

24 G.G. Marck has made repeated attempts to schedule Peng's depositions
25 without court intervention. Peng's counsel has agreed that Peng will appear, but
26 has not followed through on that agreement. Indeed, since Mid-February 2008,
27 Peng's counsel has entirely ceased responding to communications. (Commisso
28

1 Decl. ¶¶ 12-15.)

2 Last November, G. G. Marck served deposition notices setting Peng's
3 depositions for the week of December 17, 2007. (Commisso Decl. ¶ 2.) After
4 speaking with Peng's counsel on December 10, 2007, the depositions were re-
5 scheduled for January 29-31, 2008 to accommodate Peng's schedule. (Commisso
6 Decl. ¶¶ 3-7.) But a week before depositions, Peng's counsel sent G.G. Marck a
7 letter stating that Mr. Peng was in the People's Republic of China and too ill to
8 travel to the United States for his deposition. (Commisso Decl. ¶ 8.)

9 On January 28, 2008, counsel for the parties discussed rescheduling Peng's
10 depositions. (Commisso Decl. ¶ 9.) Because Peng was not expected back in the
11 United States until early February, counsel agreed to wait until then to set specific
12 dates. Nevertheless, G.G. Marck asked for, and Peng's counsel agreed to, a
13 stipulation and order to be submitted to this Court that provided that Peng would be
14 appear for deposition and that he would produce documents five days before his
15 deposition. (Commisso Decl. ¶¶ 9-10.)

16 Between January 28 and February 8, 2008, counsel for the parties traded
17 messages about depositions, but never actually spoke. On February 8, 2008,,
18 Peng's counsel left a message agreeing that the proposed stipulation should set a
19 deadline for the completion of Peng's depositions instead of setting specific dates.
20 (Commisso Decl. ¶ 10.) Between February 8 and 19, 2008, G.G. Marck tried to
21 contact Peng's counsel by phone but was not successful. (Commisso Decl. ¶¶ 11-
22 12.)

23 On February 19, 2008, G.G. Marck's counsel sent a proposed stipulation and
24 order scheduling the debtor examinations. (Commisso Decl. ¶ 13.) To date, there
25 has been no response from defense counsel to this proposed stipulation and order.
26 (Commisso Decl. ¶¶ 14-15.)

27 On February 26, 2008, G.G. Marck's counsel sent Peng's counsel a facsimile
28 informing him of G.G. Marck's plan to seek court intervention unless Peng

1 responded on or before February 27, 2008. (Commisso Decl. ¶ 15.) Peng did not
2 respond.

3 **III. DISCUSSION**

4 Rule 69 allows a judgment creditor, like G. G. Marck, to obtain discovery
5 from “any person—including the judgment debtor—as provided in these rules. . . .”
6 Rule 30 permits oral deposition of any person and any private corporation. G.G.
7 Marck has issued deposition notices and a demand for the production of documents
8 to Peng, Photo U.S.A. Corporation, and North American Investments Corporation.
9 The defendants have failed and refused to appear. Consequently, under Rule 37, G.
10 G. Marck is entitled to an order compelling Peng, Photo U.S.A. Corporation, and
11 North American Investments Corporation to appear.

12 ///

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

2 G.G. Marck respectfully requests that the Court grant this motion and order
 3 Peng, Photo U.S.A. Corporation, and North American Investments Corporation to
 4 appear for depositions on or before a date certain and to produce documents at least
 5 five court days before their depositions. After all, Peng, Photo U.S.A. Corporation,
 6 and North American Investments Corporation have agreed to appear; have agreed
 7 to produce documents before their depositions, and have agreed in principle to an
 8 order to this effect. Moreover, because there is no excuse for Peng, Photo U.S.A.
 9 Corporation, or North American Investments Corporation failure to appear or to
 10 respond to communications from G. G. Marck, the Court should further order them
 11 to reimburse G. G. Marck for part of its costs in making this motion.

12 Dated: March 7, 2008

SCHIFF HARDIN LLP

13
 14 By: 

15 Jeffrey V. Commisso
 16 Attorneys for Plaintiff
 G. G. Marck & Associates, Inc.,

17 SF9101198.2

PROOF OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States and I am a resident of the State of California and over the age of eighteen (18) years, and not a party to the within action. I am an employee of Schiff Hardin LLP, and my business address is One Market, Spear Street Tower, Thirty Second Floor, San Francisco, California 94105.

On the date below, I served a copy of the within document(s):

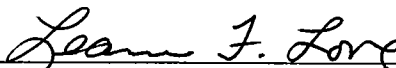
**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
G.G. MARCK'S MOTION TO COMPEL DEFENDANTS' DEPOSITIONS
(DEBTOR EXAMINATIONS) AND PRODUCTION OF DOCUMENTS**

☒ **BY U.S. MAIL:** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

Daniel R. Richardson
Richardson Intellectual Property Law
870 Market Street, Suite 615
San Francisco, CA 94102
Phone: (415) 291-8900
Fax: (415) 291-8391

*Attorneys for Defendants James Peng,
Photo U.S.A. Corporation, North
American Investments Corp. and Photo
USA Electronic Graphic, Inc.*

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 7, 2008, at San Francisco, California.



Leann F. Love

SF9046526.1